IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 978 OF 2001

BUDHIA VESTA MALPATI ..APPELLANT

V/S

THE STATE OF MAHARASHTRA ..RESPONDENT

MR.SHRIRAM SHIRSAT FOR APPELLANT.

MRS. M.M. DESHMUKH, APP FOR RESPONDENT.

CORAM : J.H. BHATIA, J.

DATE : 12TH JUNE, 2007.

JUDGMENT

1. The Accused/Appellant preferred this Appeal through jail against his conviction for offence punishable under section 304 Part I of IPC and sentence to undergo R.I. for 7 yeaars and to pay a fine of Rs. 1000/- and in default to pay fine, to undergo further R.I. for 6 months.

2. At the outset it should be noted down that the accused was convicted by the Sessions Court, Daman on 28-5-1998 and was sent to jail to undergo sentence. He filed this appeal through jail on 3-11-2000 and the Appeal came to be registered in 2001 but unfortunately it was never placed before

the court for admission prior to 13th March 2007. After the matter was placed for admission the Appeal was admitted and the Appeal is fixed for final hearing. Meanwhile, the report was called and it was revealed that on 2nd January 2003 the accused was released on bail after undergoing complete sentence including the sentence in default to pay fine. Thus hearing and disposal of the Appeal is a mere formality required to be completed under law.

3. Prosecution case in brief, is that the deceased Pravin was son of unfortunate accused/appellant. They were living together at Bhramanfalia, Bhimpore, Nani Daman. The incident of this case occurred on 28-6-1997 at about 2.30 p.m. Some quarrel took place between the accused and his son and due to that quarrel, the accused lifted a brick and gave some blows to his son with the said brick, due to which he sustained bleeding injuries on the neck and collapsed. P.W. 2 Kashiben Harjibhai, who is the sister of the accused, had come to the spot at the time of the incident to give food to deceased Pravin and she

saw the accused assaulting Pravin and shouted.

Hearing her shouts P.W. 3 Ranchhod Karia, who is the neighbour, also came to the spot of incident. He also saw the accused person at the spot with a brick in his hand and his son lying on the ground. The accused, thereafter, ran away from the spot. According to the prosecution, the accused went to the house of P.W. 4 Ramubhai Patel, who was the sarpanch of the village but Ramubhai Patel himself was not present and the accused left a message with the daughter of P.W. 4 Ramubhai Patel that his son Pravin was not well. Leaving this message, he went away. P.W. 4 Ramubhai Patel returned home at about 9 p.m. and got the message and he went to the house of the accused and found that Pravin was lying dead. Then he gave information to the police of Daman Police Station, where his report was reduced to writing. On the basis of that report, Crime No. 107/97 was registered at Police Station Daman under section 302 of IPC against the accused.

4. On the next day inquest panchnama and spot panchnama were conducted. The post mortem

examination was carried out. Statements of certain witnesses were recorded. The accused was

absconding and was arrested on 6-1-1997. On the basis of the information given by him, the blood stained brick was recovered from the house of the accused. After investigation the charge sheet was filed.

5. Charge was framed against the accused under section 302 of IPC. He pleaded not guilty. According to him, he was falsely implicated because of election politics of the village. In all 5 witnesses were examined by the prosecution. After hearing both sides the learned trial court sentenced the accused as stated above.

6. Out of the 5 witnesses examined by the prosecution, P.W. 2 Kashiben Harjibhai is the sister of the accused and she claims to be the eye witness of the incident. P.W. 3 Ranchhod Karia is the neighbour and according to him, he came to the spot after hearing the cries of P.W. 2 Kashiben. There is no other witness of the actual incident. As per evidence of P.W. 2 Kashiben on

28-6-1997 at about 2.30 p.m. she was returning home after completing her work and at that time, she went to the house of the deceased for giving

him food. In the beginning of the examination-in-chief she deposed that when she went to the house of Pravin, she noticed that Pravin was dead. However immediately thereafter she stated that at about 2.30 p.m. she heard the sound of quarrel of the accused with his son. Her own house is just behind the house of the accused. She immediately went to the house of the accused. When she reached there the quarrel was still going on between the accused and Pravin. Her evidence reveals that accused was holding a brick in his right hand. She shouted and at the same time P.W. 3 Ranchhod also came there. Accused was present at the spot even when Ranchhod came there. Ranchod caught the accused but Kashiben asked him not to hold him and keep him free. Thereafter the accused ran away from the spot. She also deposed that she had seen the accused giving blows to the deceased with a brick due to which Pravin had suffered bleeding injury and he died.

7. P.W. 3 Ranchhod deposed that at about 2.30 p.m. he was present at his house. At that time he heard the cries and immediately he rushed to the house of the accused on hearing the cries. When he reached there, he saw the accused with

a brick in his hand and Pravin lying dead on the ground. According to P.W. 3 Ranchhod, he asked Kashiben as to what had happened and Kashiben replied that her brother Budhia had killed Pravin. He also deposed that he caught hold of the accused but Kashiben asked him to leave the accused and therefore he left him and then the accused ran away from the spot.

8. It may be noted that in the cross examination it was sugggested to P.W. 2 Kashiben, that she had rushed to the spot after death of Pravin. She admitted the suggestion. However it was also suggested to her that accused Budhia and his son were quarrelling when she was inside her house. She admitted that suggestion also. Thereafter she stated that she has deposed in her examination in chief whatever she had seen. It may be noted that P.W. 2 Kashiben is the sister of the accused and therefore she must be in a dilemma to some extent

whether to depose or not, as she knew that her evidence against her brother could lead to sentence of imprisonment or imprisonment for life to him. In view of these circumstances, she tried to support the accused to some extent but then she

maintained that she had seen the incident after going to the spot. In view of these circumstances certain admissions here and there may be ignored. Her evidence clearly goes to prove that after completing her work she had gone to her house. She heard sound of quarrel of accused Budhia with deceased Pravin. After hearing the noise, she went to the house of accused Budhia and thereafter she saw the accused giving blow Pravin with a brick in his hand, due to which Pravin suffered a bleeding injury and fell on the ground and died. She cried. On hearing the cries, P.W. 3 Ranchhod came there and saw that the accused was present with brick in his right hand and body of Pravin was lying on the ground. He enquired from Kashiben as to what had happened and Kashiben told him that her brother Budhia had killed Pravin. He tried to catch hold of the accused but due to intervention of P.W. 2 Kashiben he left the

accused and then accused ran away from the spot. I do not find any reason to disbelieve this part of the evidence of these two witnesses.

9. During the cross examination of P.W. 3

Ranchhod, an attempt was made to show that because of political reasons he was giving false evidence against the accused. In the cross examination he admitted that during the last election he was in one political party and Budhia was in opposite party. On the basis of this admission, it was argued that because of the political rivalry he must have been falsely implicated the accused. However, there is nothing on record to show that accused Budhia himself was contesting any election. Merely because he was one of the workers of the opposite party, P.W. 3 Ranchhod could not falsely implicate him in the case of murder. It should not be forgotten that P.W. 3 Ranchhod is also the neighbour of the accused and that there is nothing to show that there was enemity between them. P.W. 2 Kashiben is the real sister of the accused. She has also deposed

that P.W. 3 Ranchod had come to the spot immediately after the incident and this provides corroboration to his testimony. Therefore, I am unable to accept the plea raised on behalf of the accused that because of political reasons he is falsely implicated in this case.

10. The record reveals that inquest panchnama Exhibit 7 and Spot panchnama Exhibit 8 were admitted in evidence on behalf of the accused, without examining any witness. The spot of the incident was house of the accused. The inquest panchnama reveals 3 injuries on the body of Pravin.

11. The evidence of P.W. 1 Dr. Siddharth Rathod reveals that on 29-6-1997 at about mid night he had conducted autopsy on the dead body of Pravin Budhia and he found the following injuries.

1 : Bruise over right cheek bone over maxilliary side 1.1/2" in diameter with laceration with underline bone.

2: C.L.W. size 2 cm. x 1/4 cm. deep over Left mostoid region.

3 : Clean incise wound 1/2 cm, deep over left side of neck behind the left ear and 1 inch below inch below the mostoid bone with large soft tissue swelling of 4 to 5 inches in diameter surrounding the clean incised looking wound with softening of the whole area.

12. On opening the the body he observed as folllows:-

. Fracture over the uppermost cervical spine over left side involving 2nd and 3rd cervical vertebra which was showing commutated fracture of side wings of 2nd and 3rd vertabrael processes.

. Fracture of spinal cannal of 2nd and 3rd vertabra. There was also anterior lateral subluxation with fracture on last vertabra.

. All these injuries resulted in lacerations and compression of respective spinal cord and 2nd and 3rd vertabral canal. Also there was fracture of skull at the base. This fracture was

corresponding to external injury No. 3.

13. He deposed that these injuries could be caused by a blunt object like a brick and cause of death was due to injury to the spinal cord at 1st, 2nd and 3rd cervical spine level. He accordingly issued the post mortem report Exhibit 10. In the cross examination he denied that these injuries could be possible due to fall on the ground. The

evidence of Dr. Rathod finds corroboration from the contents of inquest panchnama also. From this medical evidence it is clearly proved that 3 external injuries were found on the body and the fracture of the skull as well as 2nd and 3rd cervical vertebra were result of the external injuries and particulary the injury No. 3. Taking into consideration this evidence supported by the oral evidence of P.W. 2 Kashiben and P.W. 3 Ranchhod there remains no doubt that Pravin died homicidal death.

14. The evidence of P.W. 5 PSI Naran Vaza, in-charge of Daman Police Station, reveals that accused was absconding and he came to be arrested

on 6-7-1997. Accused was interrogated in the presence of two panch witnesses and he agreed to produce the brick from behind his house. Thereafter the police, panchas and accused went to the spot. The accused showed one brick which was lying behind the house - Article 3. It was seized under panchnama Exh. 13. This part of the evidence is also corroborated by the P.W. 4 Ramubhai Patel, who had also acted as panch witness about this recovery.

15. An attempt was made on behalf of the accused to contend that there was inordinate delay in lodging the report. According to the prosecution the incident has occured at about 2.30 p.m. while the FIR was lodged at about 10.00 p.m. on the same day. I find that the delay has been properly explained. When the incident occurred, only P.W. 2 Kashiben, sister of the accused, and P.W. 3 Ranchod were present. In view of the peculiar circumstances, possibly Kashiben was not inclined to lodge the report with the police as she had requested Ranchhod to leave the accused and thereby the accused ran away. It can be inferred that P.W. 3 Ranchhod also did not feel it necessary to lodge any report. The evidence of

P.W. 4 Ramubhai reveals that on that day, at about 3 p.m. he had left his house to go to Udwada and at about 9.30 p.m. he came back and came to know from his daughter that accused Budhia had come to his house and informed that his son was not well. After getting this information, Ramubhai Patel immediately went to the house of the accused and saw the dead body of Pravin and immediately he went to the police station and lodged report. It appears that no other person was aware of the incident. In view of these

circumstances, the delay is properly explained and merely because of delay of about 6 to 7 hours, prosecution case cannot be thrown away nor the evidence of prosecution witnesses can be disbelieved. The learned counsel Mr. Shirsat for the Appellant has placed reliance upon **Rajeevan & Anr. v/s State of Kerala (2003) 3 Supreme Court Cases 355**. In view of the facts of that case and due to delay of 12 hours in lodging the FIR, the genuineness of the FIR was doubted. He has also placed reliance upon **Om Prakash v/s. State of Maharashtra (2006) 2 Supreme Court Cases 250** wherein there was delay of 4 hours in lodging the

report, though the police station was just 15 yards from the place of occurence and telephone service was also available. In view of the facts of that case, the Supreme Court held that the delay in lodging the report raised doubt as to prosecution case under Prevention of Corruption Act. It is well settled principle of law that First Information Report should be lodged promptly to avoid any possibility of manipulating and twisting the facts and to avoid any false implication of any innocent persons. Lodging of the report at the earliest cannot be

over-emphasised. However prosecution case cannot be thrown away nor FIR can be doubted merely on the basis of some delay in lodging the same if there is satisfactory explanation about the delay.

16. Learned trial court had noted several circumstances in support of the prosecution case to come to the conclusion that accused was guilty of the offence. The accused admitted in his statement under section 313 of Cr. P.C. that P.W. 2 Kashiben was present at his house at 2.30

p.m. and she had come to give food to Pravin. The house of Kashiben is just behind the house of the accused and therefore she could immediately come to the house hearing the sound of quarrel from the house of accused. Similarly the house of P.W. 3 Ranchod is at a short distance of 50 to 60 sq. ft. and therefore he could also come there immediately on hearing the cries. The most important aspect of this case is that when the dead body of the son of the accused was lying in the house, he was holding a brick in his hand and after arrival of P.W. 3 Ranchhod he ran away from the spot and remained absconding for a period of

about 7 hours. It is against the natural conduct of a human being to run away from the spot when his own son is lying dead at the spot. No explanation is given by the accused as to how his son had died. If he was not responsible for the death there could be no reason for him to run away. On the contrary, he would have cried and rushed to the police station to see that the real culprit could be brought to book. Taking into consideration all the circumstances, I hold that the accused had assaulted his son and caused

bleeding injuries resulting into death of his son.

17. The learned trial court convicted the accused for the offence punishable under section 304 Part I of IPC. The learned Trial Court noted that the deceased was son of the accused. Incident must have occured due to sudden provocation. Ld. trial court noted that some exchange of hot words had taken place between the accused and his son and it resulted in some quarrel between them. During that quarrel, accused inflicted some bleeding injury to his neck with the brick. Learned trial court also noted that in view of these circumstances, the case is covered by

exception 4 to section 300 of IPC. The learned trial court held that accused could not be held guilty for the offence of murder punishable under section 302 of IPC. While making this observation, the learned trial court held that the accused could be convicted and sentenced for the offence punishable under section 304 Part I of IPC. Section 304 IPC reads as follows:-

"Sec. 304:- Punishment for culpable homicide not amounting to murder - Whoever commits culpable

homicide not amounting to murder, shall be punished with death, imprisonment for life or imprisonment of either description for a time which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done *with the intention of causing death, or of causing such bodily injury as is likely to cause death -*

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, *if the act is done with the knowledge that it is likely to cause death but without any intention to cause death, or to cause such bodily injury as is likely to cause death."*

18. From the language of section 304, it is clear that the accused, who commits culpable homicide not amounting to murder is to be punished under first part, if the act by which the death is caused is done either with intention of causing death or with intention of causing such bodily injury as is likely to cause death. However the offence under section 304 Part II of IPC is covered if the act is done with the knowledge that

it is likely to cause death but without any intention to cause death or without any intention to cause such bodily injury as is likely to cause death. Therefore the intention of the accused plays vital role in deciding whether the offence falls under Part I or Part II of sec. 304 IPC. Taking into consideration the circumstances noted earlier and noted even by the trial court, it is clear that due to the heated exchange of words the quarrel had taken place between the accused and his son and during the sudden quarrel and heat of passion the accused appears to have lifted the brick and assalted his son resulting in bleeding injuries. He had not used any sharp or cutting weapon or any deadly weapon. Taking into consideration the above circumstances it is

impossible to believe that the intention of the accused was to cause death of his son. It is also impossible to believe that his intention was to cause such bodily injury which was likely to cause death of his son. It may be noted that in all three injuries were found. They were on the left side of the neck and head, and they resulted into fracture of second and third vertebra of the spinal canal which resulted in the death. It

cannot be believed that he assaulted on the neck of his son with intention to cause such bodily injury which was likely to cause death. However it may be presumed that when he assaulted on the neck he could have knowledge that it was likely to cause death, though intention of causing such injury was not present. In these circumstances, in my considered opinion, the accused could be convicted for the offence of culpable homicide not amounting to murder, punishable under section 304 Part II and not Part I. Learned Trial Court did not give any reason as to why the accused was convicted under section 304 Part I.

19. The accused is the unfortunate father, who is responsible for the death of his son and his Appeal against the conviction and sentence

could not be heard before he had completed the sentence awarded by the trial court. Therefore for practical purpose it makes no difference to him whether he is convicted under section 304 Part I or Part II of IPC. In view of these circumstances, no purpose will be served by modifying the sentence awarded by the trial court.

20. For the reasons stated above, the Appeal stands dismissed. However the conviction of the accused under section 304 Part I is converted into conviction under section 304 Part II of IPC.

(J.H. BHATIA, J.)